Law Enforcement Digest

August 2002

HONOR ROLL

546th Session, Basic Law Enforcement Academy – February 5, 2002 through June 12, 2002

President:	Scott Kenoyer – Spokane County Sheriff's Office
Best Overall:	John R. Oliphant – Spokane County Sheriff's Office
Best Academic:	John R. Oliphant – Spokane County Sheriff's Office
Best Firearms:	Ron J. Schneider – Grandview Police Department
Tac Officer:	Paul Guest – Des Moines Police Department

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CORRECTION NOTE RE CHILD PASSENGER RESTRAINT LAW

The original version of the June 2002 **LED** contained erroneous information in the summary regarding the child passenger restraint law that went into effect on July 1, 2002. The mistake concerned the upper-end age and weight limit for booster seats. The June **LED** entry has been corrected on the Criminal Justice Training Commission **LED** internet page, but officers should in any event look at the statute itself, RCW 46.61.687, for the correct and complete information. Those accessing this August **LED** electronically should be able to access the RCW by clicking on the following:

RCW 46.61.687.doc

A publicly accessible website for all RCWs (current through January 2002) is listed below:

<http://www.leg.wa.gov/rcw/>

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BRIEF NOTES FROM THE WASHINGTON STATE SUPREME COURT

(1) CRIMINAL TRESPASS AT PUBLIC HOUSING AUTHORITY FACILITIES – IF NO LEASE PROVISION TO CONTRARY, PREVIOUSLY "TRESPASSED" GUEST

HAS LIMITED RIGHT TO BE ON PREMISES AT INVITATION OF TENANT – In State v. Blunt, ___ Wn.2d ___, ___ P.3d ___ (2002) (2002 WL 1206584), the Washington Supreme Court addresses the right, in the absence of a specific lease provision limiting tenant-invitation power, of a person previously "trespassed" from a premises to re-enter and be on the premises at the invitation of a tenant of the premises.

For criminal trespass purposes, a landlord-tenant agreement may lawfully restrict the ability of tenants to invite tenants onto the leased premises, including common areas. However, the Supreme Court unanimously agrees in Blunt that, in the absence of such a restrictive lease provision, a tenant may give a guest permission to pass through common areas of the leased premises in order to visit the tenant, even though previously the landlord had expressly prohibited the tenant's would-be guest from being on the premises. The invitation-power of the tenant is a limited one, allowing the guest to pass through only those common areas necessary for ingress and egress to and from the tenant's unit.

In these consolidated cases, the defendants had been previously "trespassed" from the public housing facilities. On several occasions after that, they were found in common areas on the premises. In their criminal trespass prosecutions, each of the defendants established that he had an open invitation from his fiancée-tenant and that he was going to visit her apartment on the premises at the time of the alleged trespass.

The Supreme Court declares that, since the prosecution did not rebut the defendants' claims of such an open invitation, and since there was no evidence of a restrictive lease provision, the only question in this cases was whether the defendants had exceeded the scope of the invitation.

The Court concludes that in some of the cases the defendants had exceeded the scope of the fiancée-tenant's invitation. That is because they were found in areas on the premises and under circumstances where a jury could reasonably conclude they were not going to or from their fiancée- tenant's apartment. In other cases, on the other hand, the defendants could not be convicted because, under the court's ingress-egress rule, the jury could only conclude from the evidence that the defendants were privileged to be near their tenant-fiancées' apartments.

Along the way, the Supreme Court rejects the defendants' constitutional challenges to the anti-trespassing policy of the Bremerton Housing Authority. In part of that discussion, the Court raises, but does not answer, the question of whether a constitutional right of "intimate association" might have been implicated if the defendants had been married to, or otherwise family members of, the tenants.

Result: Affirmance of some Bremerton Municipal Court convictions for criminal trespass against Karl Widell and Larry Blunt; reversal of other Municipal Court convictions for criminal trespass against Widell and Blunt (the Kitsap County Superior Court had affirmed all of the convictions.)

(2) DRIVE-BY SHOOTING STATUTE – EVIDENCE HELD INSUFFICIENT TO CONVICT BECAUSE FACTS INVOLVED "WALK-BY" (NOT "DRIVE-BY") SHOOTING -- In State v. Locklear, 146 Wn.2d 55 (2002), the Washington Supreme Court agrees with the Court of Appeals that defendants involved in a "walk-by" shooting could not be convicted of "drive-by" shooting under RCW 9A.36.045. However, the Supreme Court unanimously concludes that the ruling should be grounded in lack of evidence to support the charges, not on constitutional grounds cited by the Court of Appeals. See entry on Court of Appeals decision at **Nov 01 LED:20**.

The Supreme Court describes the facts in the case as follows:

> The stipulated facts that were presented to the trial court at Locklear's and Rodgers' joint trial revealed that the criminal enterprise that ultimately led to their conviction had its inception when Julie Ishaq enlisted the defendants to "shoot up" the home of Locklear's former girl friend, Celia Vela. In furtherance of

this plan, Ishaq drove Locklear and Rodgers to the "area of town" where Celia Vela lived, parking her car two blocks from Vela's home. Locklear and Rodgers then got out of Ishaq's car, armed with a .12 gauge shotgun and a .30-.30 caliber rifle, and walked the two blocks to Vela's house. From that location they each "intentionally fired several shots into the Vela household." Following the shooting Rodgers and Locklear ran back to Ishaq's parked car. Ishaq then drove the "vehicle away carrying the shooters and the firearms used in the crime." The stipulated facts were adopted by the trial court and reduced to findings of fact. Based on these facts, the trial court concluded that Locklear and Rodgers each discharged a firearm from the "immediate area" of the vehicle driven by Ishaq.

The Supreme Court explains as follows why these facts do not support a conviction under RCW 9A.36.045:

> RCW 9A.36.045(1) defines the crime of drive-by shooting as a reckless discharge of a firearm
>
> > in a manner which creates a substantial risk of death or serious physical injury to another person and the discharge is either from a motor vehicle or from the immediate area of a motor vehicle that was used to transport the shooter or the firearm, or both, to the scene of the discharge.
>
> Neither "immediate" area nor "scene" of discharge is defined in the statute.
>
> It is apparent from the stipulation and the trial court's findings of fact that Locklear did not discharge a firearm from a moving or parked vehicle. Indeed, the trial court made no such conclusion. The more pertinent question is whether the findings are sufficient to support the trial court's conclusion that Locklear discharged a firearm from the "immediate area" of Ishaq's vehicle. If Locklear's culpability could be established merely by showing that he discharged a firearm from the "area" of Ishaq's motor vehicle or from the "area of town" that her vehicle was located in, then it might be said that the evidence supports Locklear's conviction. The drive-by shooting statute is, however, more narrowly drawn and requires the State to produce evidence that the firearm was discharged by the defendant from the "immediate area" of the vehicle which transported the shooter. It seems obvious that one is not in the immediate area of a vehicle that is parked two blocks away from the place where that person discharges a firearm. That is the case we have here and, thus, we have no difficulty saying that the evidence is insufficient to support the trial court's conclusion of law that Locklear was guilty of drive-by shooting. In making this determination, we find it helpful to accord the term "immediate" its dictionary definition, which *Webster's Third New International Dictionary* defines as "existing without intervening space or substance . . . being near at hand: not far apart or distant." Similarly, *Black's Law Dictionary* defines "immediate" as "[n]ot separated in respect to place; not separated by the intervention of any intermediate object."
>
> In sum, we are satisfied that the trial court's findings of fact do not support its conclusion that Locklear was in the "immediate area" of Ishaq's motor vehicle when he discharged a firearm into Vela's house. Thus, his conviction for drive-by shooting cannot stand. Having said that, we quickly add that Locklear's acts were reprehensible and undoubtedly contravene other statutes not before this court. His acts do not, however, run afoul of the statute on which the charge against him was based. In our view, the legislature aimed this relatively new statute at individuals who discharge firearms from or within close proximity of a vehicle. Undoubtedly, it was concerned that reckless discharge of a firearm

> from a vehicle or in close proximity to it presents a threat to the safety of the public that is not adequately addressed by other statutes. A person discharging a firearm two blocks away from a vehicle cannot be said to be in close proximity to that vehicle. To conclude otherwise would be akin to attempting to shove a square peg into a round hold--it does not fit.

Result: Affirmance of Court of Appeals': 1) reversal of Pierce County Superior Court drive-by conviction of Eddie James Locklear and 2) vacation of Pierce County Superior Court conviction of Jesse Lee Rodgers.

(3) U.S.-CANADIAN BORDER, NOT 49TH PARALLEL, CONTROLS CRIMINAL JURISDICTION IN WASHINGTON – In State v. Norman, 145 Wn.2d 578 (2002), the Washington Supreme Court rules 8-1 that the northern border of Washington is coextensive with the international boundary between the U.S. and Canada, rather than strictly along the 49th parallel.

In these three consolidated cases involving border-crossing searches in Whatcom County, U.S. Customs officers found illegal drugs in two of the cases and stolen property in a third one. The defendants were charged accordingly by the county prosecutor in state court in the three cases, and they moved to dismiss the charges. The defendants claimed that, because they were located above the 49th parallel of north latitude when they committed their crimes, they had not committed a crime subject to prosecution in Washington state courts.

The trial court rejected their challenge, and they were convicted. The Washington Supreme Court granted review, and that Court has now affirmed the trial court. The majority opinion briefly summarizes the Court's analysis and holding as follows:

> Our state constitution provides that Washington State's northern boundary in the relevant area is "west along said forty-ninth parallel of north latitude." Const. art. XXIV, § 1. At the time the United States-Canada border was originally surveyed, prior to Washington's admission into the Union as a state, the surveyors used an astronomic method of locating the 49th parallel that failed to account for local gravitational pulls. For this and other reasons, the international border does not lie on the 49th parallel as currently located.
>
> We hold that this state's northern boundary is coextensive with the international boundary as marked, and accordingly affirm the trial court's denial of the defendants' motion to dismiss for want of subject matter jurisdiction.

Justice Sanders filed a dissenting opinion.

Result: Affirmance of Whatcom County Superior Court convictions of Helen J. Norman (possession of controlled substance), Laura Lee Stradwick (possession of controlled substances), and Kevin C. Belen (possession of stolen property).

Status: The defendants have petitioned the U.S. Supreme Court with a request for review.

(4) IN SENTENCING PROCEEDING, CCO MAY DISAGREE WITH PROSECUTOR'S PLEA BARGAIN, BUT INVESTIGATING LAW ENFORCEMENT OFFICER MAY NOT – In State v. Sanchez, State v. Harris, ___ Wn.2d ___, 46 P.3d 774 (2002), shifting majorities of the Washington Supreme Court reach mixed results on who other than the prosecutor is bound to a sentencing recommendation that is part of a plea bargain.

A majority of the Court (Justices Madsen, Alexander, Sanders, Johnson and Chambers) concludes that an investigating law enforcement officer acts on behalf of the prosecutor and therefore may not ask the court to impose a harsher sentence than that agreed to by the prosecutor under the plea bargain. However, a different majority (Justices Bridge, Ireland, Smith, Owens and Chambers) concludes that a community corrections officer acts on behalf of

the trial court, not on behalf of the prosecutor, and therefore a CCO may make an independent sentencing recommendation.

Result: Reversal of Grant County Superior Court sentence of Librado Sanchez on his guilty pleas to three counts of child molestation in the second degree – case remanded for resentencing; affirmance of Skagit County Superior Court sentence of Mark Harris on his guilty plea to communicating with a minor for immoral purposes.

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WASHINGTON STATE COURT OF APPEALS

FACTS AS A WHOLE ADD UP TO PROBABLE CAUSE TO SEARCH MOTEL ROOM WHERE LOCAL RESIDENT WITH DRUG-ARREST HISTORY CHECKED INTO MOTEL AND RECEIVED MULTIPLE PHONE CALLS AND MULTIPLE VISITORS

State v. Tarter, 111 Wn. App. 336 (Div. III, 2002)

Facts and Proceedings below: (Excerpted from Court of Appeals opinion)

> John and Rita Santillanes own and operate a Spokane motel. Ms. Tarter rented a room. She paid cash.
>
> There were supposed to be only two occupants. Motel staff saw at least four people staying in the room. Numerous people came and went from the room. Twenty calls had come in for Ms. Tarter's room in the span of an hour. Mr. Santillanes saw people leave the motel room and go across the street to a Flying J truck stop to meet with other people. The Santillaneses called police and told them all of this.
>
> Deputy Gladden ran a computer check on Ms. Tarter's car. The car belonged to her. And she had a local Spokane address. Ms. Tarter also had multiple arrests for controlled substances.
>
> Deputy Gladden, armed with the above information, requested and received a telephonic search warrant for Ms. Tarter's motel room. He searched the room and found drugs.
>
> Ms. Tarter moved to suppress the evidence obtained in the search. The court denied her motion. A jury subsequently convicted Ms. Tarter of possession of a controlled substance.

ISSUE AND RULING: Was probable cause to search the motel room established by the totality of the circumstances (local-resident-checking-into-motel, multiple phone calls and multiple visitors, plus drug-arrest history)? (ANSWER: Yes) **[LED EDITORIAL NOTE: The Tarter Court asserts in the analysis below that the Court need not decide in this case how, or if, an arrest history, as opposed to a conviction history, factors into the probable cause analysis. See our follow-up comment on this point.]**

Result: Affirmance of Spokane County Superior Court conviction of Cindy Cherie Tarter for possession of a controlled substance.

ANALYSIS: (Excerpted from Court of Appeals opinion)

> The facts supporting the probable cause here come from an informant. So we apply the Aguilar-Spinelli test.
>
> The Aguilar-Spinelli test requires (1) showing that the informant had a sufficient basis of knowledge, and (2) showing the informant's veracity. The State must satisfy both prongs "unless other police investigation corroborates the informant's tip."

Here, the Aguilar-Spinelli test is satisfied. The basis of the Santillaneses' knowledge is their own firsthand observations. And passing on firsthand information satisfies the basis of knowledge prong.

The Santillaneses' veracity is also established. First, the State's burden is relaxed because the Santillaneses are named citizen informants. Here, the Santillaneses were named citizens and disclosed owners and operators of the motel. Their veracity was adequately established.

Ms. Tarter next claims that the information submitted by Deputy Gladden was insufficient to establish probable cause because all the facts concerned innocuous, lawful behavior.

Probable cause does not require "proof of criminal activity," but merely belief that criminal activity may have occurred. **[This is an understatement of the probable cause standard – LED Ed]**

We review an application for a search warrant in light of common sense, and all doubts are resolved in favor of the warrant's validity. Facts, that when viewed in isolation do not constitute probable cause, may be viewed together and with other facts to establish probable cause.

Here, Ms. Tarter lives in Spokane. But she checked into a Spokane motel and paid cash. Numerous people came to and went from her motel room. People left her room to meet with strangers across the street at a truck stop. And Ms. Tarter received 20 phone calls in the span of an hour. Deputy Gladden also determined that Ms. Tarter had multiple prior arrests for controlled substance violations.

The effect of prior arrests is not clear. Prior convictions, while not forming probable cause alone, may be used as one factor when determining whether probable cause is present.

But we find no Washington case that allows prior arrests (rather than convictions) to be used when determining probable cause. Here, sufficient facts support probable cause independent of all the prior arrests. We need not pass on the propriety of using them. Other states have, however, permitted consideration of prior arrests for the same or similar crimes as a factor for probable cause.

Viewed individually, each fact would not be sufficient to establish probable cause. But the issuing judge is allowed to draw reasonable inferences from the facts and circumstances found in the affidavit. And when taken together, the facts support a judge's commonsense determination that probable cause existed to believe Ms. Tarter was involved in criminal activity in her motel room, particularly given the "great deference" accorded to the issuing judge.

[Citations omitted]

LED EDITORIAL COMMENT: The Tarter Court is correct that no prior Washington appellate decision has addressed whether a person's history of mere arrests (as opposed to convictions) may be considered in the probable cause determination. But we think that the Tarter Court was unduly cautious in not following the approach of courts in other jurisdictions on this question. It appears that most other courts that have considered the question have held that a record of prior arrests for a similar crime, if not extremely remote in time, is a strong factor in establishing probable cause. See discussion in LaFave, Search and Seizure (3rd Edition 1996) § 3.2(d). As with all probable cause questions, details are important. All relevant known details regarding prior arrests, such as dates, whether contraband was recovered, etc. should be set forth in the

affidavit.

NO FERRIER WARNINGS WERE REQUIRED WHERE OFFICERS WERE MERELY ASKING RESIDENT FOR PERMISSION TO COME INSIDE AND TALK TO HER GRANDSON; HER CONSENT WAS VOLUNTARY AND OFFICERS DID NOT EXCEED SCOPE OF CONSENT

State v. Khounvichai, 110 Wn. App. 722 (Div. I, 2002)

Facts and Proceedings below: (Excerpted from Court of Appeals opinion)

> Viengmone Khounvichai was charged in juvenile court with one count of possession of cocaine. At the fact-finding hearing, [Officer A] testified that she investigated a reported incident of malicious mischief on January 30, 2000. The complainant said that a man named McBaine had been at her house shortly before an object came through the window. The complainant then gave [Officer A] an address for McBaine.
>
> At about 10:00 p.m., accompanied by [Officer B], [Officer A] went to the address provided by the complainant. According to [Officer A], McBaine was a "person of interest" and the purpose of the visit was "basically [to conduct] a knock and talk." **[LED EDITORIAL NOTE: This phrase should be sparingly used by officers, limiting its use to true knock-and-talk searches.]** The officers knocked on the door, which was answered by Elizabeth Orr. The officers asked if they could talk to McBaine. Orr replied, "Oh, yes, he's my grandson," and asked if he was in trouble. [Officer A] told her they just wanted to talk to him and asked if they could come in. At this point, Orr responded "Oh, yes, of course," opened the door, and stepped back. The officers then entered into the living room.
>
> After the officers entered, Orr immediately walked down the hallway to a rear closed bedroom door. [Officer A] stood near the man in the living room, while [Officer B] followed Orr about halfway down the hallway and stopped. Orr knocked on the bedroom door and told the occupants that "there was somebody here to see you." When McBaine opened the door, both officers smelled burning marijuana.
>
> McBaine turned around and said something to the two other occupants of the room, including Khounvichai. Through the open door, both officers saw Khounvichai bolt from view. Believing that Khounvichai might be going for a weapon, [Officer B] quickly entered the bedroom and saw Khounvichai part way inside a closet. [Officer B] then ordered Khounvichai to show his hands. When Khounvichai failed to comply, [Officer B] attempted to grab his hands. During the ensuing struggle, [Officer B] saw Khounvichai fling a white object, which fell near the open door. [Officer A] looked down as she entered the room and saw a baggie containing a white substance that was later identified as cocaine. As the officers looked at the baggie on the floor, Khounvichai yelled out, "That ain't my shit."
>
> Khounvichai moved to suppress the cocaine, arguing that Orr's consent to enter the home was invalid under State v. Ferrier, 136 Wn.2d 103 (1998) **Oct 98 LED:02** because the police had not advised her of the right to refuse their request. He also argued that Orr's consent was not voluntary under the totality of the circumstances and that the officers had exceeded the scope of Orr's [the grandmother's] consent. The juvenile court denied the motion, concluding that Ferrier did not apply because the officers intended only to speak with McBaine, not search the residence. The court also determined that Orr's consent was

voluntary and that the officers did not exceed the scope of the consent. The court found Khounvichai guilty as charged at the conclusion of the fact-finding hearing.

ISSUES AND RULINGS: 1) Were Ferrier warnings required in order to obtain consent to enter from the suspect's grandmother? (ANSWER: No); 2) Was the grandmother's consent voluntary on the totality of the circumstances? (ANSWER: Yes); 3) Did the officers unlawfully exceed the scope of the grandmother's consent when one of the officers followed the grandmother part-way down the hallway? (ANSWER: No)

Result: Affirmance of King County Superior Court juvenile adjudication of Viengmone Khounvichai for possession of cocaine.

ANALYSIS: (Excerpted from Court of Appeals opinion)

1) Were Ferrier warnings required?

In Ferrier, the court addressed the propriety of police "knock and talk" procedures, concluding that the greater privacy protection afforded by article I, section 7 of the Washington Constitution imposed the following requirement:

> [W]hen police officers conduct a knock and talk for the purpose of obtaining consent to search a home, and thereby avoid the necessity of obtaining a warrant, they must, prior to entering the home, inform the person from whom consent is sought that he or she may lawfully refuse to consent to the search and that they can revoke, at any time, the consent that they give, and can limit the scope of the consent to certain areas of the home. The failure to provide these warnings, prior to entering the home, vitiates any consent given thereafter.

Central to the Ferrier court's ruling is the inherently coercive nature of a police request to search, particularly when the request is made after officers have entered the home. At the time they asked for permission to search, the four officers in Ferrier were armed, were wearing black raid jackets, and had entered the defendant's home and were standing in the small front room. Under such circumstances, a truly voluntary consent to search must be based on knowledge of the right to refuse consent before officers have entered the home.

But the Supreme Court has repeatedly rejected any suggestion that Ferrier established a bright-line rule requiring a warning every time a police officer requests permission to enter a residence. *[Court's footnote: See State v. Bustamante-Davila, 138 Wn.2d 964, 983 P.2d 590 (1999)* ***Nov 99 LED:02*** *(Ferrier warnings not required when police officers accompanied INS agent serving a deportation order); see also State v. Leupp, 96 Wn. App. 324 (1999)* ***Oct 99 LED:05*** *(police officer responding to 911 "hang-up" call not required to advise resident of the right to refuse consent before entering to ascertain whether anyone inside was in need of assistance).]* In State v. Williams, 142 Wn.2d 17 (2002) **Dec 00 LED:14** for example, a citizen informant told officers that the defendant had an outstanding arrest warrant and could be found at a local apartment. After confirming the accuracy of the information, the officers received permission to enter the apartment to confirm the identities of the occupants. Given the limited purpose for the police entry, the court found that the case did not resemble the type of knock and talk warrantless search that Ferrier was intended to prevent:

> We recognize that law enforcement officers need to enter people's homes in order to provide their valuable services for the community on a daily basis. We do not find it prudent or necessary to extend Ferrier to require that police advise citizens of their right to refuse entry every time a police officer enters their home. Police officers are oftentimes invited into homes for investigative purposes, including inspection of break-ins, vandalism, and other routine responses. We do not find a constitutional requirement that a police officer read a warning each time the officer enters a home to exercise that investigative duty. To apply the Ferrier rule in these situations would unnecessarily hamper a police officer's ability to investigate complaints and assist the citizenry. *Instead, we limit the requirement of a warning to situations where police seek to conduct a search for contraband or evidence of a crime without obtaining a search warrant.*

Here, as in Williams, the officers did not seek to enter the residence to look for contraband or arbitrarily search the house. Rather, it is undisputed that the officers went to the Orr residence to ask McBaine, who was a suspect and "person of interest," if he had information about the reported malicious mischief. The officers did not ask to search the residence, and nothing in the record suggests they had any motive for entering beyond talking to McBaine. Moreover, given the nature of the crime under investigation, there was no reasonable likelihood that physical evidence associated with the alleged malicious mischief would be found in the house, either in plain view or through a search.

The officers in this case entered the residence for a limited, routine investigatory purpose. Because their conduct did not constitute the type of coercive knock and talk procedure addressed in Ferrier, the officers were not required to advise Orr of her right to refuse consent. Contrary to Khounvichai's suggestion, [Officer A's] characterization of the procedure as a knock and talk is not controlling. It is the nature of police conduct, not a witness's descriptive label, that determines the applicability of the Ferrier rule.

Khounvichai argues that an officer's request to enter a residence to talk to an occupant about an alleged offense is no different than a request to search because "[t]he result of the entry is the same--an open or plain view search without a warrant." For this proposition, Khounvichai relies on the recent decision in State v. Kennedy, 107 Wn. App. 972 (Div. II, 2001) **Nov 01 LED:06** in which the court determined that "the officers' request for permission to enter is, in effect, a request for permission to 'search' for anything in plain view." But this statement must be viewed in context.

In Kennedy, police officers went to the defendant's motel room to investigate a complaint about a narcotics transaction in progress. After hearing activity inside the room that was consistent with drug activity, the officers knocked at the door. When the defendant opened the door, the officers explained that they were investigating a complaint about the room and asked if they could come in and talk about it. After entering, the officers saw drugs in plain view. Although the officers in Kennedy did not ask for permission to search, they were investigating a crime in progress, with the obvious possibility of contraband in plain sight. Under such circumstances, a request to enter is arguably tantamount to a request to search. The facts in Kennedy are therefore distinguishable, and we

do not read the decision as suggesting that Ferrier warnings are required whenever an officer asks for permission to enter a residence to talk to an occupant about a potential criminal matter.

2) Was consent voluntary?

Khounvichai next contends that even if Ferrier does not apply in this case, the juvenile court erred in finding that Orr's consent to enter was voluntary and that the officers did not exceed the scope of the consent. Whether consent is freely given is a factual determination based on the totality of the circumstances, including whether Miranda warnings had been given prior to obtaining consent, the degree of education and intelligence of the consenting person, and whether the consenting person was advised of the right not to consent. No one factor is determinative, and the State bears the burden of establishing the voluntariness of the consent by clear and convincing evidence.

In this case, the officers identified themselves and accurately described the purpose of their visit; they made no show of force or claim of authority to enter. Given the preliminary stage of the investigation, their failure to respond directly to Orr's question about whether McBaine was "in trouble" was neither deceptive nor misleading. Moreover, as the trial court found, Orr was on notice "that there was some concern about McBain[e]." Orr did not hesitate in her responses and immediately gestured for the officers to enter the house after they explained their purpose. Certainly there was no reason to give Miranda warnings to Orr. Finally, the officers' testimony clearly established that Orr was of average or greater intelligence. Under these circumstances, the absence of Miranda warnings and the failure to advise Orr of the right to refuse do not negate consent. The juvenile court did not err in finding that Orr's consent was voluntary.

3) Did an officer exceed the scope of consent by going part-way down the hall?

Finally, Khounvichai contends that [Officer B] exceeded the scope of consent when he walked down the hallway. We disagree. After inviting the officers inside to talk to McBaine, Orr immediately walked down the hallway to the bedroom door. While [Officer A] stood near the man in the living room, [Officer B] walked a short distance down the hallway, where he stopped and waited. Under the circumstances, [Officer B's] conduct was reasonable and completely consistent with the scope of Orr's consent and the purpose of talking to McBaine.

[Some citations and footnotes omitted; underlining of text added]

INTIMIDATING A WITNESS – ONLY INDIRECT "THREATS" NEED BE PROVED, EVEN IF DEFENDANT DID NOT INTEND THAT "THREATS" BE COMMUNICATED TO THE "TARGET"

State v. Anderson, 111 Wn. App. 317 (Div. III, 2002)

Facts and Proceedings below: (Excerpted from Court of Appeals opinion)

Darrell Anderson convinced himself that Nelda Guajardo, an investigator with Child Protective Services (CPS), had altered a document. The State had placed his children in its custody. Mr. Anderson and his uncle met with Mrs. Guajardo to discuss the matter. The exchange was acrimonious.

Mr. Anderson called his community corrections officer, Carol Nickerson, and threatened Mrs. Guajardo: "Nelda is fucked and she better watch out." Ms. Nickerson told her supervisor, Rigoberto Guajardo, who is also Mrs. Guajardo's husband.

That evening CPS workers apparently woke Mr. Anderson's children during a random unscheduled check on them. Mr. Anderson's uncle responded by calling Mrs. Guajardo at home. He asked her what it was like to be woken up in the middle of the night, and what it was like to have her sleep disturbed. Mrs. Guajardo hung up.

Mr. Anderson called the Guajardo household a few minutes later. Mr. Guajardo answered and would not allow Mr. Anderson to speak with his wife. Mr. Guajardo hung up the phone without letting Mr. Anderson speak to Mrs. Guajardo. Mrs. Guajardo called the police.

Ina Carpenter, a child welfare case worker, began working with Mr. Anderson's family in October 1999. The State had placed Mr. Anderson's children in protective custody. They were returned to their mother, Dea Green, but later returned to foster care.

On April 9, 2000, Mr. Anderson wrote his mother a letter from jail. It read:

> I'm afraid for a few people when I get out and find my boys in foster home. I will and I promise, I will go to prison for life for multiple MURDERS. . . . Ida [Ina Carpenter] is my first stop and Dea will be my last stop, with a few people in between. (ie foster parents) My boys will not live in the system like I did. . . .
>
> When I get out I'll try by the book once and only once to get my boys, then shit will hit the fan. I will not fuck around when it comes to them anymore.

On April 11, 2000, police responded to a call over a dispute between Mr. Anderson's mother and Ms. Green. Mr. Anderson's letter was turned over to the police.

The State charged Mr. Anderson with two counts of intimidating a witness in violation of RCW 9A.72.110(2). One count was for threats regarding Mrs. Guajardo, and one count was for threats regarding Ms. Carpenter. Following a bench trial, the court convicted Mr. Anderson of both.

ISSUES AND RULINGS: 1) Does Anderson's letter to his mother justify his intimidating-a-witness conviction as to Ms. Carpenter, even though he did not intend that his mother convey that "threat" to Ms. Carpenter? (ANSWER: Yes, because such intent is not an element of the crime); 2) Do Anderson's a) phone conversation with his CCO, and b) his phone call to Mrs. Guajardo's home in which he conversed with her husband justify his intimidating-a-witness conviction as to Mrs. Guajardo? (ANSWER: Yes, because these "threats" directed to third parties can support a conviction for "intimidating")

Result: Affirmance of Benton County Superior Court convictions of Darrell L. Anderson on two counts of intimidating a witness.

ANALYSIS: (Excerpted from Court of Appeals opinion)

> It is a crime to intimidate a witness: "A person also is guilty of intimidating a witness if the person directs a threat to a former witness because of the witness's role in an official proceeding." A former witness includes "[a] person whom the actor knew or believed may have provided information related to a criminal investigation or an investigation into the abuse or neglect of a minor child." RCW 9A.72.110(3)(c)(iv).
>
> > "Threat" means to communicate, directly or indirectly the intent:
> > (a) To cause bodily injury in the future to the person threatened or to any

other person; or

. . .

(j) To do any other act which is intended to harm substantially the person threatened or another with respect to his health, safety, business, financial condition, or personal relationships[.]

RCW 9A.04.110(25).

Letter containing threat to Ms. Carpenter

Mr. Anderson argues that the evidence is insufficient to support his conviction. He did not intend that his letter reach Ms. Carpenter. The question is whether that intention is necessary. And no Washington case directly addresses this question.

The issue has, however, been addressed in another context -- intimidating a judge. State v. Hansen, 122 Wn.2d 712 (1993) **Feb 94 LED:06**.

In Hansen, the court held that whether the defendant intended that his threats would reach the judge was irrelevant. The court stated:

> [W]hoever threatens a judge, either directly or indirectly, *e.g.*, through a third person, because of an official ruling or decision by that particular judge, is chargeable under [the intimidating a judge statute]. *The threat may ultimately find its way to the judge, but that is irrelevant with regards to the commission of the crime*.

The rationale in Hansen is equally compelling here. Indeed, there the pertinent statute says: "A person is guilty of intimidating a judge *if a person directs a threat* to a judge because of a ruling or decision of the judge in any official proceeding . . . ." RCW 9A.72.160(1) (emphasis added). Similarly, the intimidating a witness statute states: A person also is guilty of intimidating a witness *if the person directs a threat* to a former witness because of the witness's role in an official proceeding." RCW 9A.72.110(2) (emphasis added). Both statutes use the identical action language, "if a person directs a threat." RCW 9A.72.160(1); RCW 9A.72.110(2). Both of these statutory schemes address the same subject matter and here the same purpose.

RCW 9A.72.110(2) (intimidating a witness) requires no proof that the defendant intended his threats to reach the victim. Hansen is persuasive authority that such an intent is irrelevant. There was sufficient evidence to support Mr. Anderson's conviction for intimidating a witness based on the threatening letter.

Telephone calls to Mrs. Guajardo's home

Mr. Anderson next argues that (1) he never spoke directly to Mrs. Guajardo the night the calls were made, and (2) his statements to Ms. Nickerson were not threats and were never communicated to Mrs. Guajardo. And he directed any language toward Mrs. Guajardo's job, not her physical well-being.

Again, the fact that Mr. Anderson's threats were not made directly to Mrs. Guajardo is irrelevant. It is enough if threats are directed to a third party. Accordingly, the fact that Ms. Nickerson did not contact Mrs. Guajardo about the threatening phone call is irrelevant. As is the fact that Mr. Anderson spoke only to Mr. Guajardo the night he called and not personally with Mrs. Guajardo.

Next, in passing on the sufficiency of the evidence we consider the inferential meaning of the words he used. Mr. Anderson called his correction officer. He said that "Nelda is fucked and she better watch out." He argues this was

directed toward Mrs. Guajardo's job. But when viewed in the light most favorable to the State, this is a threat directed at Mrs. Guajardo. Ms. Nickerson expressed concern for Mrs. Guajardo's safety because of the call. The evidence adequately supports the conviction.

[Some citations omitted]

EVIDENCE HELD SUFFICIENT TO PROSECUTE FOR TELEPHONE HARASSMENT

State v. Lansdowne, ___ Wn. App. ___, 46 P.3d 836 (Div. III, 2002)

Facts: (Excerpted from Court of Appeals opinion)

> Ms. Lansdowne called her daughter's school because one of the teachers had taken away her daughter's cell phone. She spoke to Del McKinley, a school secretary. Ms. Lansdowne stated that if the teacher, Toddette McGreevy, so much as touched that phone, she would "send someone to beat the shit out of Mrs. McGreevy." She said she would "nail her to the cross and set fire to it" and "take care of that bitch." She also said that "Mrs. McGreevy had better not touch my child or I will personally see that the bitch pays for it."

Proceedings: Ms. Lansdowne was charged with telephone harassment. She moved to dismiss on grounds the facts were undisputed and did not establish a case on which a supported conviction was possible. The Garfield County Superior Court granted her motion to dismiss.

ISSUE AND RULING: Do the undisputed facts support a prosecution for telephone harassment? (ANSWER: Yes)

Result: Reversal of Garfield County Superior Court order dismissing telephone harassment charges against Jacqueline Lansdowne (the Court of Appeals also reverses a trial court order dismissing charges of unlawful imprisonment against Ms Lansdowne and her husband, Mark Lansdowne, regarding a separate incident not addressed in this **LED** entry).

ANALYSIS: (Excerpted from Court of Appeals opinion)

> The telephone harassment statute under which Ms. Lansdowne was charged provides:
>
> > Every person who, with intent to harass, intimidate, torment or embarrass any other person, shall make a telephone call to such other person:
> >
> > (1) Using any lewd, lascivious, profane, indecent, or obscene words or language, or suggesting the commission of any lewd or lascivious act; or
> >
> > (2) Anonymously or repeatedly or at an extremely inconvenient hour, whether or not conversation ensues; or
> >
> > (3) Threatening to inflict injury on the person or property of the person called or any member of his or her family or household; shall be guilty of a gross misdemeanor, except that the person is guilty of a class C felony if either of the following applies:
> >
> > (a) That person has previously been convicted of any crime of harassment, as defined in RCW 9A.46.060, with the same victim or member of the victim's family or household or any person specifically named in a no-contact or no-harassment order in this or any other state; or

> (b) That person harasses another person under subsection (3) of this section by threatening to kill the person threatened or any other person.

RCW 9.61.230. Specifically, the State alleges that Ms. Lansdowne violated subsection (1) by using indecent or obscene words with the intent to harass, intimidate, torment or embarrass Ms. McKinley. To overcome a challenge [to the sufficiency of the evidence] under these circumstances, the State must produce evidence that the defendant (1) made a telephone call; (2) with the intent to intimidate the person called; and (3) used indecent language. RCW 9.61.230.

The superior court dismissed the charge finding that the State could not prove the required elements of the crime. Specifically, the [superior] court reasoned, "[t]he only 'off color' words recalled by M[s.] McKinley were bitch and shit. These words cannot be considered to be lewd, lascivious, indecent or obscene. They are also not profane."

The [superior] court further reasoned that the first section of the statute--every person who, with the intent to harass, intimidate, torment, or embarrass any other person, shall make a telephone call to such other person--requires that the telephone call be directed to the threatened person. In other words, unless subsection (3) is implicated, threatening someone other than the person to whom the call is made does not violate the statute.

The evidence shows that Ms. Lansdowne called the school and spoke to Ms. McKinley, the school secretary. She stated that the purpose of her call was "to complain about a teacher." In the course of her conversation with Ms. McKinley she stated, "she would send someone to beat the shit out of Mrs. McGreevy" and she would "nail her to the cross and set fire to it" and "take care of that bitch." These statements contain threats that are directed to Ms. McGreevy and not Ms. McKinley. Nevertheless, they may evidence an intent to intimidate Ms. McKinley.

The first issue is whether these statements evidence an intent to intimidate, a mental element of the statute. "Intimidate" is defined as: "to make timid or fearful: inspire or affect with fear: frighten . . . to compel to action or inaction (as by threats)." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1184 (1993). Viewed in the light most favorable to the State, a reasonable fact finder could find that Ms. Lansdowne intended to intimidate Ms. McKinley and affect her conduct by using obscene language and threatening Ms. McGreevy.

The second issue is whether the words "shit" and "bitch" are indecent or obscene language. "Indecent" is defined as: "not decent: . . . altogether unbecoming: contrary to what the nature of things for which circumstances would dictate as right or expected or appropriate: hardly suitable: unseemly." WEBSTERS, supra, 1147. "Obscene" is defined as: "marked by violation of accepted language inhibitions and by the use of words regarded as taboo in polite usage." WEBSTERS, supra, 1557. Ms. Lansdowne used the word "bitch" not in reference to a female dog, but in reference to a female human being. Such usage is both indecent and obscene as those words are commonly defined. A rational trier of fact could have determined that Ms. Lansdowne's words were indecent or obscene.

The superior court erred by dismissing the telephone harassment count. The case is remanded for trial.

[Some citations omitted]

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BRIEF NOTES FROM THE WASHINGTON STATE COURT OF APPEALS

(1) COURT RULES FOR STATE ON SEARCH WARRANT PC AND OMISSIONS-FR0M-AFFIDAVIT ISSUES; ALSO RULES THAT SEPARATE SEARCH WARRANT WAS NOT REQUIRED FOR INSTALLATION AND TRACKING OF GLOBAL POSITIONING SYSTEM TRACKING DEVICES, BUT IMPLIES THAT WARRANT MAY BE REQUIRED IN OTHER CASES – In State v. Jackson, ___ Wn. App. ___, 46 P.3d 257 (Div. III, 2002), the Court of Appeals rejects a murder defendant's challenge to the probable cause support for a search warrant to search his vehicles and home, as well as rejecting his argument that omissions from the warrant affidavit destroyed its validity. The Jackson Court also rejects defendant's challenge to separate search warrants under which police obtained authority to install Global Positioning System (GPS) tracking devices on his vehicles. The Jackson Court asserts on the GPS tracking device question that no separate search warrants were even required under the facts of this case. However, the Jackson Court gives unclear signals and analysis in this regard, so Washington officers wishing to install and track GPS tracking devices in vehicles in future cases should first consult their prosecutors or agency legal advisors.

At 8:45 a.m. on a school day, William Bradley Jackson called 911 to report his 9-year-old daughter missing. He had been the only person at home with her since 4:30 a.m. that day. The girl's school backpack was still at the residence. Police officers found blood stains on a pillow and bed sheet in the girl's bedroom. Jackson told police the girl had developed a nose bleed during the night, but police found no waste tissue or other material consistent with the nose bleed story. Based on this and other evidence, the officers concluded that Jackson had killed his daughter and disposed of the body. Police obtained search warrants, including a warrant authorizing searches of Jackson's car and truck, as well as warrants authorizing installation of GPS tracking devices on the car and truck.

After secretly installing the GPS devices and returning the vehicles to Jackson, a detective told Jackson that the detective was fairly certain that Jackson had not buried the body deep enough to prevent animals from digging it up. Subsequent monitoring of the devices revealed that Jackson drove to one outdoor location where officers later found the buried body and another outdoor location where officers later found other evidence.

Jackson was charged with murdering his daughter. He unsuccessfully challenged evidence seized under the warrants and as a result of tracking the GPS devices. Following his conviction for first degree murder, he appealed. On the issue of whether the warrant to search his vehicles and his home was supported by probable cause, the Court of Appeals agrees with the trial court and the State that probable cause to search the car and truck was established in the following evidence included in the affidavit:

> Mr. Jackson reported his 9-year-old daughter missing from the family residence. Blood was found on her pillow and bed sheet. More than one pubic hair was located in her bed sheets. No one heard screams or saw the child between 4:30 and 8:30 a.m. Her backpack was discovered at the residence. Mr. Jackson was the sole person at the home during her disappearance and he had access to two vehicles. These facts establish probable cause to believe evidence of a crime would be found in the residence and/or in vehicles accessible to Mr. Jackson.

As to the various items of information left out of the affidavit, the Court of Appeals says that these bits of information either: 1) were not relevant to PC; and/or 2) were not omitted intentionally or recklessly by the officer-affiant; and/or 3) were not inaccurately described by the affiant-officer in the affidavit.

The Court of Appeals also addresses issues of whether either probable cause or a search warrant was necessary for installation and tracking of the GPS tracking devices. In what we find to be confusing analysis, the Jackson Court agrees with the State that, under the circumstances of this case, where the officers already had warrants to search the two vehicles, no search warrant was necessary for installation of the tracking devices. However, the Court indicates that police were well-advised in this case to seek search warrants for installation authority, and the Court seems to suggest that police

would be well-advised in the future to seek a search warrant to obtain judicial authorization to install and monitor GPS tracking devices.

The Jackson Court rejects defendant's apparent argument that use of a tracking device is like a general baseless exploratory search – with or without a warrant – because police don't know in advance when the suspect will go. In rejecting this argument, the Court of Appeals concludes that where, as here, all tracking occurred in publicly accessible areas, no constitutional intrusion can be established.

Result: Affirmance of Spokane County Superior Court conviction of William Bradley Jackson for first-degree murder.

LED EDITORIAL COMMENT: This is the first case on this issue in Washington. We strongly recommend that Washington law enforcement agencies considering use of GPS tracking devices work with their prosecutors to obtain search warrants authorizing installation and tracking of such devices.

(2) "EXCITED UTTERANCE" HEARSAY EXCEPTION MET DESPITE THE FACT THAT RAPE VICTIM WAS INITIALLY RELUCTANT TO TALK TO POLICE -- In State v. Lawrence, 108 Wn. App. 226 (Div. I, 2001), the Court of Appeals rules that a rape victim's report of her attack to her boyfriend about 15 minutes after the assault qualified under the "excited utterance" hearsay exception, despite the fact that, after recounting her story to her boyfriend, she hesitated before calling the police.

The Lawrence Court describes as follows the facts that developed immediately after the victim, Diane, was raped by defendant Lawrence:

> Diane walked about three to four blocks to Nightwatch. When she walked in, she met a volunteer screener. Diane told the screener that she had just been raped. Diane did not want the volunteer to call the police. Diane had a warrant for her arrest, and was concerned she would be taken to jail.
>
> Stubbs [the victim's boyfriend] was already at Nightwatch. He saw Diane across the room, crying and upset. Stubbs walked over to Diane and she told him that she had just been raped, and told him the details of the assault.
>
> Stubbs and the screener encouraged Diane to call the police. She initially hesitated because she had an outstanding warrant for her arrest, but later agreed to call 9-1-1.

The trial court allowed [the boyfriend] Stubbs to testify over defendant's hearsay objection regarding Diane's statement to him the night of the incident. On appeal, defendant renewed his argument that this hearsay did not meet the test of the exception for "excited utterances" in that Diane's reluctance to call the police that night showed she was in a reflective state of mind, not an excited one.

The excited utterance exception to the hearsay rule is based on the idea that under certain external circumstances of physical shock, a stress of nervous excitement may be produced which stills the reflective faculties and removes their control; the utterance of a person in such a state is believed to be a spontaneous and sincere response to the actual sensations and perceptions already produced by the external shock, rather than an expression based on reflection or self-interest.

Three requirements must be met for hearsay to qualify as an excited utterance: (1) a startling event or condition must have occurred; (2) the statement must have been made while the declarant was still under the stress of the startling event or conditions; and (3) the statement must relate to the startling event or condition.

To qualify as an excited utterance, declarant's statement should be made contemporaneously with or soon after the startling event giving rise to it, since, as the time between the event and the statement lengthens, the opportunity for reflective thought arises and the danger of fabrication increases. The longer the time interval, the greater the need for proof that the declarant did not actually engage in reflective thought.

A victim's initial refusal to call the police does not necessarily preclude admission of any subsequent statement as an excited utterance, the Lawrence Court declares. The determination of spontaneity is time sensitive, and many factors can raise serious doubts as to the declarant's genuine state of mind. After discussing several Washington decisions on the "excited utterance" hearsay exception, the Lawrence Court concludes under following concluding analysis that Diane's account of the rape to her boyfriend meets the "excited utterances" hearsay exception:

> Although Diane's brief hesitation in calling the police raises a tenuous doubt as to her excited state of mind, this factor alone is not conclusive. A victim's initial refusal to call the police does not necessarily preclude admission of any preceding statement as an excited utterance. The determination of spontaneity is time sensitive, and many factors can raise serious doubts as to the declarant's genuine state of mind. The real question is whether Diane was still under the stress earlier produced causing her to exclaim spontaneously, not whether she had unrelated concerns which gave her second thoughts about notifying police after making the statement.
>
> There is no doubt that just 10 to 15 minutes before Diane spoke to Stubbs, a startling event had occurred. When Diane entered Nightwatch, she was shaking and sobbing. At first, Diane would not say what was wrong. Instead, she continued to sob. She eventually told Stubbs that she was raped. Stubbs testified that he had only seen Diane cry as hard once before, when her sister died. The fact that she briefly hesitated before calling the police does not show that she lacked the requisite excitement at the time she told Stubbs about the details of the rape. Any opportunity to reflect on her own self-interest was made during a time of severe stress. Diane's hearsay statements about the rape were properly admitted under the excited utterance exception.

Result: Affirmance of King County Superior Court second degree rape conviction and "Two-Strikes" sentencing of Eddie L. Lawrence.

(3) STATE WINS ON "EXCITED UTTERANCE" AND "PHOTO MONTAGE" ISSUES IN CASE WHERE OFFICER WAS SHOT DURING A TRAFFIC STOP -- In State v. Ramires, 109 Wn. App. 749 (Div. III, 2002), the Court of Appeals rules: a) that an officer's statements after he was shot during a traffic stop qualified under the hearsay exception for "excited utterances;" and 2) that a photo montage shown to the officer-victim following the shooting was not impermissibly suggestive.

On the "excited utterance" issue, the Ramires Court holds that, at the point when the officer-victim described the shooting and the suspects to another officer in a hospital interview about 30 minutes after the shooting, the officer-victim was still under the influence of the shocking event of the shooting, and therefore the officer-victim's statement qualified as an "excited utterance."

On the photo montage issue, the record indicates that a few mistakes were made by police in putting together the photo montage, but the errors were not significant enough to make the procedure impermissibly suggestive. The two minor errors in the photo ID procedure were: 1) that the suspect was the only person in the photos wearing a dark shirt, which is the color of shirt that the officer-victim had described right after the shooting; and 2) that the officer conducting the ID procedure told the officer-victim that a photo of the arrested suspect was in the montage (the Court of Appeals says this second mistake was of little or no importance in this case because the officer-victim would have assumed this anyway).

The Ramires Court rules that the following facts overcame any suggestiveness in the photo ID procedure: 1) the officer-victim was trained and experienced in making observations; 2) when the crime occurred, the officer was on-alert as he approached the driver and shined a flashlight in his face; 3) the officer's contemporaneous description of the defendant and his passenger was fairly accurate and detailed; and 4) the officer was confident when he picked defendant's picture from the montage.

Result: Affirmance of Yakima County Superior Court convictions of Wuenceslao Ramires for attempted murder, taking a motor vehicle without permission, and unlawful possession of a firearm (two counts).

LED EDITORIAL NOTE: See the article on "Lineups, showups and photographic spreads" on the CJTC Internet website at [http://www.cjtc.state.wa.us/cjtc/led/ledpage.html].

(4) PHOTO MONTAGE WAS NOT IMPERMISSIBLY SUGGESTIVE, BECAUSE THE DIFFERENCES BETWEEN DEFENDANT'S PHOTO AND THE OTHER PHOTOS WERE ONLY "MINOR" -- In State v. Vickers, 107 Wn. App. 960 (Div. II, 2001), the Court of Appeals rejects all arguments raised in appeals by two murderers, including the argument by one of the murderers that officers had used an impermissibly suggestive photo montage in the police investigation of a robbery-murder. The Vickers Court summarizes as follows its analysis of the photo ID issue:

> Paul Vickers claims that an impermissibly suggestive photo montage violated his due process rights because: (1) his was the only Department of Licensing photo among five other MUGGIS photos; (2) the background in his photo was lighter than the other photos; and (3) he was the only person not wearing coveralls in the montage. He argues that this suggestiveness created a substantial likelihood of misidentification when analyzed under Neil v. Biggers, 409 U.S. (1972), and State v. Cook, 31 Wn. App. 165 (1982). *[COURT'S FOOTNOTE: These reliability factors include: (1) the opportunity of the witness to view the criminal at the time of the crime, (2) the witness' degree of attention, (3) the accuracy of the witness' prior description, (4) the level of certainty at the confrontation, and (5) the length of time between the crime and the confrontation.]* But the law is to the contrary.
>
> An out-of-court photographic identification meets due process requirements if it is not so impermissibly suggestive as to create a substantial likelihood of irreparable misidentification. Vickers bore the burden of first showing that the procedure was impermissibly suggestive. When a defendant fails to show impermissible suggestiveness, the inquiry ends.
>
> Here, finding that any differences were too slight to be impermissibly suggestive, the trial court denied Paul's motion to suppress the montage identification. Our independent review of the montage supports the trial court's determination. Each picture appears to be the same size and shows a man with dark scalp hair and facial hair (mustaches and goatees), and of approximately the same age. In light of these substantial similarities, the trial court was justified in ruling that any differences between Paul's photo and the other five were minor.
>
> "Minor differences" in photos "are not suggestive enough to warrant further inquiry into the likelihood of misidentification." State v. Eacret, 94 Wn. App. 282 (1999). Accord State v. Hendrix, 50 Wn. App. 510 (1988) (defendant's photo the only one with tiny number in the corner); Weddel, 29 Wn. App. 46 (1981) (defendant's photo 1/4 inch larger and with unique background). Therefore, the trial court committed no error in admitting identifications based on the montage, which was not impermissibly suggestive.

[Footnotes and some citations omitted]

Result: Affirmance of Pierce County Superior Court convictions and sentence of John P. Vickers for 1st degree felony murder and attempted 1st degree murder with firearm enhancement; affirmance of convictions and sentence of Paul T. Vickers for aggravated 1st degree murder and attempted 1st degree murder.

(5) KNOWLEDGE OF PRESENCE OF GUN IS NOT AN ELEMENT OF CPL LAW AT RCW 9.41.050 – In Seattle v. Briggs, 109 Wn. App. 484 (Div. I, 2002), the Court of Appeals rules that knowledge of the presence of a gun is not an element of the non-felony crime of carrying a pistol concealed without a permit.

The Briggs Court finds to be distinguishable the Washington Supreme Court decision in State v. Anderson, 141 Wn.2d 357 (2000) **Oct 00 LED:13**. Anderson held that RCW 9.41.0**4**0, the statute prohibiting possession of a firearm by, among others, convicted felons, contains an implied element of knowledge of the presence of the firearm. Because violation of the CPL statute at RCW 9.41.0**5**0 is

not a felony, and because it is very unlikely that person could have a pistol concealed on his or her person and not know about it, the Briggs Court concludes that RCW 9.41.0**5**0 does not contain a knowledge element.

Result: Affirmance of King County Superior Court affirmance of Seattle Municipal Court conviction of Dwayne Briggs for violation of the CPL statute, RCW 9.41.050(1).

(6) FELON IN POSSESSION OF RIFLE NOT ALLOWED TO ARGUE THAT HE WAS EARLIER MISLED BY HIS CCO'S ADVICE THAT HE COULD HAVE A RIFLE, BECAUSE HE HAD SUBSEQUENTLY BEEN WARNED BY POLICE TO THE CONTRARY – In State v. Locati, 111 Wn. App. 222 (Div. III, 2002), the Court of Appeals addresses defendant's jury-instruction argument relating to his theory that, because his community corrections officer had told him in 1996 that he could lawfully posses a rifle, he should be excused from prosecution under RCW 9.41.040.

The Locati Court does not conclusively resolve whether or not bad advice from a government officer might be a valid defense under RCW 9.41.040 under some circumstances. In this case, however, two police officers visited Locati in 1998 and told him that he could not lawfully posses any firearms. Under such circumstances, it could not be reasonable for Locati to rely on earlier, contrary, erroneous advice from his CCO, the Locati Court holds.

Result: Affirmance of Walla Walla County Superior Court convictions of Shawn A. Locati on five counts of unlawful possession of a firearm in the second degree, RCW 9.41.040(1)(b).

(7) EVIDENCE HELD SUFFICIENT TO SUPPORT CONVICTIONS FOR 1) RESISTING ARREST AND 2) OBSTRUCTING – In State v. Ware, ___ Wn. App. ___, 46 P.3d 280 (Div. III, 2002), the Court of Appeals rejects Mojolene Ware's challenges to the sufficiency of the evidence to convict her for obstructing and resisting arrest.

Officers were called to a reported disturbance. While officers were trying to arrest Ms. Staggs, who was threatening to assault another person at the scene, Ms. Ware approached the officers and belligerently demanded they release Ms. Staggs. Despite repeated warnings from the officers, she did not retreat or otherwise obey the officers sufficiently to cease to be a hindrance or obstruction to the officers' actions against Ms. Staggs.

After getting Ms. Staggs under control, an officer told Ms. Ware she was under arrest. She said, "you're not going to take me," and she fled. These facts supported her separate convictions for obstructing and for resisting arrest, the Ware Court holds.

Along the way, the Court of Appeals distinguishes the case of State v. CLR, 40 Wn. App 839 (1985). In CLR, the Court of Appeals ruled that a defendant could not be convicted of obstructing for shouting warnings across the street to a prostitute that the would-be "John" with whom the prostitute was talking was actually an undercover vice officer. CLR is distinguishable for two main reasons, the Ware Court holds: 1) at the moment when the shouts were made, the defendant in CLR could not know from across the street what action, if any, the undercover officer was trying to take; and 2) the officer in CLR was not trying to take enforcement action at the moment the shouting of warnings occurred.

Result: Affirmance of Spokane County Superior Court adjudication of guilt of Mojolene A. Ware for obstruction and resisting arrest.

(8) EVIDENCE HELD SUFFICIENT TO SUPPORT CONVICTIONS FOR MANUFACTURING METH AND FOR POSSESSING METH WITH INTENT TO MANUFACTURE OR DELIVER – In State v. McPherson, ___ Wn. App. ___, 46 P.3d 284 (Div. III, 2002), the Court of Appeals rejects a meth manufacturer's challenge to the sufficiency of evidence to support her convictions manufacturing and for possessing with intent to deliver.

During a traffic stop, suspected illegal drugs came into plain view, and officers arrested the driver of a car in which defendant McPherson was a passenger. The McPherson Court describes the search that followed:

> [T]wo black bags were discovered, one made of canvas, the other leather; Ms. McPherson claimed both bags. The canvas bag was found on the middle-front floorboard. The leather bag was found on the rear floorboard.

> In the canvas bag, officers found a large number of unopened bottles of pseudoephedrine. Under these bottles, the officers found a plastic baggie containing ground-up pseudoephedrine. Found separately from the canvas bag, a pseudoephedrine bottle was located in the back seat, and an unopened box of pseudoephedrine was located on the rear floorboard.
>
> In the leather bag, which apparently served as Ms. McPherson's purse, the officers discovered among other items a citation and court notice belonging to Ms. McPherson, a notebook containing credit card numbers with names that did not match the occupants of the vehicle, a small knife with an unidentified residue on it, and a small box containing a small plastic scale with white powder residue on it. Ms. McPherson specifically claimed the scale, which lab-tested positive for methamphetamine.
>
> With consent from Mr. Zunker, Officer Baker looked in the car's trunk. Officer Baker found a 35-pound cylinder containing what Mr. Zunker said was anhydrous ammonia. The tank contained a trace amount of the gas. Officers found Mr. Zunker possessed $220 cash and Ms. McPherson possessed $80 cash when arrested.

McPherson was convicted of one count of manufacturing methamphetamine and one count of possessing meth with intent to manufacture or deliver. The Court of Appeals rejects McPherson's challenge to the sufficiency of the evidence to support her convictions.

1) Manufacturing

The evidence was sufficient to allow the jury to conclude that McPherson participated directly or as an accomplice in methamphetamine production, so as to support her conviction for manufacturing methamphetamine, even if needed alkali metal and commonly used and readily accessible items for production were not present at the time of her arrest. McPherson had in her actual possession a scale with methamphetamine residue, numerous methamphetamine precursors, and notebooks containing apparent records of drug transactions. She lied when arrested, and she subsequently gave inconsistent testimony. A tank containing traces of anhydrous ammonia was found in the trunk of the car in which McPherson was riding as a passenger, and the car's driver possessed grams of "meth" and $220 cash, in addition to $80 cash found on McPherson.

2 Possessing-with-intent to manufacture or deliver

Likewise, the McPherson Court concludes that the evidence was sufficient to allow the jury to conclude that the methamphetamine on a scale found on McPherson was the unpackaged product of her manufacturing activity, as well as the remnants of sales activity, so as to support her conviction of possessing methamphetamine with intent to manufacture or deliver. McPherson's possession of the scales was in close proximity with a co-defendant, who was carrying a marketable quantity of methamphetamine. Thus, considering notebooks found on McPherson with presumed records of sales, and the $300 possessed between McPherson and a co-defendant, the jury could infer that McPherson used the scales to help facilitate her co-defendant's possession with intent to deliver.

Result: Affirmance of Benton County Superior Court convictions of Jeri L. McPherson for meth manufacturing and possessing meth with intent to manufacture or deliver.

(9) EVIDENCE HELD SUFFICIENT TO SUPPORT CONVICTIONS FOR POSSESSING METH WITH INTENT TO DELIVER AND MANUFACTURING METH – In State v. Zunker, ___ Wn. App. ___, 48 P.3d 344 (Div. III, 2002), the Court of Appeals rejects a defendant's argument that there was insufficient evidence to support his convictions for: 1) manufacturing methamphetamine and 2) possessing methamphetamine with intent to deliver. The Zunker case arose from the same incident as the McPherson case digested immediately above in this **LED**.

The Zunker majority opinion describes the facts in the case as follows:

> The police stopped Mr. Zunker because they thought that the car he was driving was stolen. They ordered him out of the car and patted him down. They found a vial containing two grams of methamphetamine in his pants pocket. They then arrested him and searched his car.

> They found several bottles of cold pills in a black bag on the front floorboard and another bottle on the back seat. The bag also contained a significant amount of ground-up cold pills. A small scale with methamphetamine residue on it was found in another bag in the car. Two small notebooks with names and phone numbers were also found. One of the notebooks had credit card numbers. At this point, the officers suspected a mobile meth lab. They asked for and received Mr. Zunker's consent to search the trunk.
>
> The trunk contained a large tank with "anhydrous ammonia" stamped on the side. The tank was empty except for trace amounts of anhydrous ammonia.

1) Possessing with intent to deliver

Defendant argued on appeal that the quality of illegal drugs that he possessed was insufficient to prove intent to deliver where the only evidence of that intent was circumstantial. The Zunker Court explains that, as a general proposition, there is no minimum amount of drugs that must be found to have been possessed in order to make a case of possession with intent to deliver:

> We have declined to find intent to deliver in the absence of anything to deliver. State v. Todd, 101 Wn. App. 945 (Div. III, 2000) **Jan 01 LED:11**. In Todd, the defendant's fingerprints on various items containing drug residue supported a finding of possession. But the quantity of residue was too small to deliver. Here, the amount of drugs was arguably sufficient for one or two sales. Detective Boehmler testified that the smallest unit of methamphetamine sold is one gram. Most users buy 1.8 grams--a "teener"--or two teeners for personal use.
>
> Other courts have affirmed convictions for intent to deliver where the quantity of drugs was more consistent with personal use.

The Zunker Court acknowledges that the $220 defendant had on his person might not be enough additional evidence to establish intent to deliver, but that here the defendant

> also had scales bearing meth residue, notebooks with names and credit card numbers, a cell phone battery, and meth ingredients. And the key to the trunk (containing the anhydrous ammonia tank) was in his wallet.

Together, the evidence was sufficient to allow a jury to infer intent to deliver, the Court rules.

2) Manufacturing

The Zunker majority explains as follows its view that the evidence was sufficient to support a conviction for manufacturing methamphetamine:

> Mr. Zunker argues that the methamphetamine precursors found in his possession might support a conviction of possession of ephedrine or pseudoephedrine with intent to manufacture. RCW 69.50.440. But he contends they do not prove actual manufacture.
>
> The State's witnesses testified that the manufacture of methamphetamine requires more than pseudoephedrine and anhydrous ammonia. It also requires: lithium or a similar alkali metal; rock salt; two kinds of solvent, either toluene or denatured alcohol, and an oil-based solvent, acetone or ether; a hydrochloric acid gas generator, usually a large mason jar with tubes coming out of it; a large mixing vessel; coffee filters; and a heat source--not essential, but usual for drying the filters.
>
> And we recently affirmed a manufacturing conviction where the police seized a flask, two glass jars, and a three-liter separatory funnel. State v. Todd **[Jan 01 LED:11]** The flask contained residue of red phosphorus (a lithium substitute). One jar contained another precursor as well as methamphetamine in an intermediate liquid form that would be converted into powder for use. The funnel contained a chemical by product of meth manufacture.
>
> Here, Mr. Zunker had ground-up cold pills and an anhydrous ammonia tank.

> The meth, the scale, and the partially empty anhydrous ammonia tank raise a permissible inference that some manufacturing had already taken place.
>
> And he also had pseudoephedrine in the form of ground-up pills. Grinding such "pill powder" is a preparatory step to the meth "cooking" process. Just about all that was needed to process a new batch of meth was more anhydrous ammonia, lithium, and a few other components. This evidence raises a reasonable inference that Ms. McPherson and Mr. Zunker were arrested while preparing to make a new batch of meth.
>
> From the foregoing evidence a reasonable juror could conclude beyond a reasonable doubt that Mr. Zunker produced methamphetamine. RCW 69.50.101(p). Accordingly, the evidence was sufficient to support his conviction for manufacture.

Judge Schultheis dissents on the "manufacturing-evidence" issues, asserting that the evidence established only preparation to manufacture, not manufacturing.

Result: Affirmance of Benton County Superior Court convictions of Leiton L. Zunker for possessing methamphetamine with intent to deliver and for manufacturing methamphetamine.

(10) "INDECENT EXPOSURE" HELD TO BE "CRIME AGAINST A PERSON" UNDER BURGLARY STATUTE – In State v. Snedden, ___ Wn. App. ___, 47 P.3d 184 (Div. III, 2002), the Court of Appeals rules, 2-1 (Judge Schultheis dissenting), that the crime of "indecent exposure" is a "crime against a person" within the meaning of RCW 9A.52.030(1). Accordingly, when a man who previously had been ordered out of a private college's library for exposing himself subsequently returned to the library on 3 separate days and exposed himself to the library patrons, he could be prosecuted for three counts of burglary in the second degree.

Result: Reversal of Spokane County Superior Court order dismissing the burglary charges against Steven J. Snedden; remand for trial.

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NEXT MONTH

The September 2002 **LED** will include entries on the following recent decisions:

1) The June 17, 2002 decision of the U.S. Supreme Court in U.S. v. Drayton, 122 S. Ct. 2105 (2002), in which the U.S. Supreme Court upholds a search that occurred on a Greyhound bus as part of a random-check, drug interdiction program on inter-city busses; the Drayton Court rules, 6-3, that no "seizure" occurred and that consent was voluntary when randomly contacted bus passengers consented to searches of their bags and their persons (*the September **LED** article on Drayton will include the **LED** Editorial view that, under article 1, section 7 of the Washington constitution, a more restrictive rule likely applies to such random sweeps);* and

2) The July 3, 2002 decision of the Washington Supreme Court in State v. Glossbrener, ___ Wn.2d ___ (2002) (2002 WL 1429785), in which the Washington Supreme Court rules that an officer-safety "car frisk" was not objectively justified, where, after observing a driver make a furtive gesture as the driver pulled over during a traffic stop, and after asking the driver about the movement, an officer chose to return to his patrol car to make a radio check for warrants and then to conduct field sobriety tests before doing an officer-safety "frisk" of the traffic detainee's car.

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ORDER FORMS FOR SELECTED RCW PROVISIONS

Order forms for 2001 selected RCW provisions of interest to law enforcement are available on the Criminal Justice Training Commission website on the "Professional Development" page. The direct link to the order form is [http://www.wa.gov/cjt/forms/rcwform.txt].

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INTERNET ACCESS TO COURT RULES & DECISIONS, TO RCW'S, AND TO WAC RULES

The Washington Office of the Administrator for the Courts maintains a web site with appellate court information, including recent court opinions by the Court of Appeals and State Supreme Court. The address is [http//:www.courts.wa.gov/]. Decisions issued in the preceding 90 days may be accessed by entering search terms, and decisions issued in the preceding 14 days may be more simply accessed through a separate link clearly designated. A new website at [http://legalwa.org/] includes Washington State Supreme Court opinion from 1969 to the present. It also includes links to the full text of the RCW, WAC, and 70 Washington city and county municipal codes. Washington Rules of Court (including rules for appellate courts, superior courts, and courts of limited jurisdiction) are accessible via links on the Courts' website or by going directly to [http://www.courts.wa.gov/rules].

Many United States Supreme Court opinions can be accessed at [http://supct.law.cornell.edu/supct]. This web site contains all U.S. Supreme Court opinions issued since 1990 and many significant opinions of the Court issued before 1990.

Easy access to relatively current Washington state agency administrative rules (including DOL rules in Title 308 WAC, WSP equipment rules at Title 204 WAC and State Toxicologist rules at WAC 448-15), as well as all RCW's current through January 2002, is at [http://slc.leg.wa.gov/]. Information about bills filed in 2002 Washington Legislature is at the same address -- look under "Washington State Legislature," "bill info," "house bill information/senate bill information," and use bill numbers to access information. Access to the "Washington State Register" for the most recent WAC amendments is at [http://slc.leg.wa.gov/wsr/register.htm]. In addition, a wide range of state government information can be accessed at [http://access.wa.gov]. The address for the Criminal Justice Training Commission's web site is [http://www.cjtc.state.wa.us], while the address for the Attorney General's Office web site is [www.wa.gov/ago].

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The Law Enforcement Digest is co-edited by Senior Counsel John Wasberg and Assistant Attorney General Shannon Inglis, both of the Washington Attorney General's Office. Questions and comments regarding the content of the **LED** should be directed to Mr. Wasberg at (206) 464-6039; Fax (206) 587-4290; E Mail [johnw1@atg.wa.gov]. Questions regarding the distribution list or delivery of the **LED** should be directed to Darlene Tangedahl of the Criminal Justice Training Commission (CJTC) at (206) 835-7337; Fax (206) 439-3752; E mail [dtangedahl@cjtc.state.wa.us]. **LED** editorial commentary and analysis of statutes and court decisions express the thinking of the writers and do not necessarily reflect the views of the Office of the Attorney General or the CJTC. The **LED** is published as a research source only. The **LED** does not purport to furnish legal advice. **LED**'s from January 1992 forward are available via a link on the Commission's Internet Home Page at: [http://www.cjtc.state.wa.us].